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No. 88-886

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

TAYLOR MADE OFFICE SYSTEMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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13pp

QUESTION PRESENTED

Whether, under the circumstances of this case, a remark by a member of the union's in-plant organizing committee to one other employee concerning possible retaliation against strike replacements in the event of a future strike coerced current employees to vote in favor of the union in an impending representation election.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Boston Insulated Wire & Cable Co., 259 N.L.R.B. 1118 (1982) 6
Hamilton Label Services, Inc., 243 N.L.R.B. 598 (1979) 3, 5
Hickory Springs Mfg. Co. v. *NLRB*, 645 F.2d 506 (5th Cir. 1981) 5, 7
Loose Leaf Hardware, Inc., 246 N.L.R.B. 350 (1979) 7
Loose Leaf Hardware, Inc. v. *NLRB*, 666 F.2d 1036 (6th Cir. 1981) 5, 7
May Dept. Stores Co. v. *NLRB*, 707 F.2d 430 (9th Cir. 1983) 6
NLRB v. *Advanced Systems, Inc.*, 681 F.2d 570 (9th Cir. 1982) 5, 7, 8
NLRB v. *Georgetown Dress Corp.*, 537 F.2d 1239 (4th Cir. 1976) 6
NLRB v. *L & J Equip. Co.*, 745 F.2d 224 (3d Cir. 1984) 5, 6
Orleans Mfg. Co., 120 N.L.R.B. 630 (1958) 6
Scioscia d/b/a Home & Indus. Disposal Serv., 266 N.L.R.B. 100 (1983) 5, 8, 9

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 4
§ 8(a)(5), 29 U.S.C. 158(a)(5) 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D1-D5) and its order after rehearing (Pet. App. E1-E8) reaffirming its original opinion are unreported. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. C1-C13) is reported at 280 N.L.R.B. No. 151. The Board's underlying decision and certification of representative (Pet. App. B1-B4) and the Acting Regional Director's report on objections (Pet. App. A1-A8) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1988. The petition for a writ of certiorari was filed on November 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Workers of America, AFL-CIO (the Union) won a representation election among petitioner's service technicians by a vote of 29 to 25, with two non-determinative challenged ballots. Pet. App. A1-A2. Petitioner filed timely objections to the conduct of the election alleging, inter alia, that the Union had unlawfully coerced, threatened, and intimidated employees. *Id.* at E4.[1] In support of that objection, petitioner submitted the affidavit of Steve Burgess, an employee who had voted in the election (Appendix and Excerpts of Record (A&E) E5), as to a single alleged threat made by Ray Bass, a member of an in-plant organizing committee, and documents (A&E E6-E10) allegedly establishing that Bass was acting as an agent of the Union.

Burgess's affidavit stated that he had attended a meeting called for petitioner's employees by "an In-Plant Committee for CWA Local 9410," that Frank Tanner, an organizer and official of the Union had addressed the employees, said that he "wanted to recognize the people on the Union's In-Plant Committee [] because they were the ones who were really responsible for contacting the union and organizing the employees," and identified six employees who were present at the meeting, including Bass, whom Burgess had "known for some time at work." A&E E5 paras. 2, 3. According to Burgess, he sought Bass out during a break in the meeting, asked him what would happen if contract talks failed, the "Union * * * called a strike and the company replaced employees who went out

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[1] Petitioner's additional objections, which were denied, are not at issue here.

on strike." The following exchange then occurred, *id.* para. 3; Pet. App. D4:

> Bass replied, "that's when the shotguns come out." I was surprised at that statement and said something like, "are you serious? Would it really go that far? Would that really happen?" Bass replied that he didn't think that Barry [petitioner's owner] would let it go that far, but if it did, "that's when the shotguns come out."

Burgess's affidavit further stated that Bass was an avid gun collector who went "shooting a lot" and had invited Burgess to accompany him, that Bass's statements to him were "made in a serious manner, and not in a joking way," and that they were heard by Burgess alone. *Id.* paras. 4, 5.

2. After an administrative investigation of petitioner's objection and the evidence submitted in support, the Acting Regional Director concluded that, assuming that the statement reported in Burgess's affidavit had in fact been made, "no evidence was presented that there were other employee witnesses present. Moreover, although the speaker had earlier been identified as being on the employee organizing committee, this is insufficient evidence to make him an agent of the [Union] or to bind the [Union] by his statements." Pet. App. A6-A7. He recommended that petitioner's objection be overruled, and that a certification issue. *Id.* at A6, A7.

The Board reviewed the record in light of petitioner's exceptions, and concluded that the exceptions "raise[d] no material or substantial issues of fact * * * which would warrant a hearing." Pet. App. B2 n.2. The Board agreed with the Regional Director's finding that "there was insufficient evidence that the employee, who allegedly made an objectionable statement, was an agent of the Union[,]" and, citing *Hamilton Label Services, Inc.*, 243 N.L.R.B.

598 (1979), the Board concluded that "the conduct alleged was not so aggravated as to create a general atmosphere of fear and reprisal rendering a free expression of choice of representative impossible." Pet. App. B2 n.3. The Board certified the Union on the basis of the election results. *Id.* at B3.

Petitioner refused to bargain, and a complaint issued alleging that the refusal violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5). On the General Counsel's motion for summary judgment, the Board found a violation and directed petitioner to bargain with the Union on request. Pet. App. C1-C13.

3. The court of appeals, in an unpublished memorandum order, enforced the Board's order. Pet. App. D1-D5. The court held that the Board did not abuse its discretion in denying an evidentiary hearing on petitioner's objection because petitioner did not make out a prima facie case of coercive conduct. *Id.* at D4-D5. Having found no coercive conduct, the court did not consider petitioner's claim that Bass was acting as the Union's agent. On rehearing, the panel majority reaffirmed its original opinion; Judge Alacorn, dissenting, concluded that petitioner had made out a prima facie case that the election was tainted by alleged threats by a union representative, and that petitioner was entitled to an evidentiary hearing on its objection. *Id.* at E2-E8.

ARGUMENT

Petitioner argues that Bass's response to Burgess's inquiry concerning the Union's reaction to replacement of employees during any future strike established a prima facie case of coercion. Petitioner claims that the court below therefore erred in refusing to remand the case to the

Board for a hearing on its contention that employees were denied a free choice in the representation election. That claim does not warrant further review.

It is now settled that, although threats of violence can contaminate the election process, the question whether actions by union agents or representatives have so poisoned the atmosphere that a fair election is impossible must be determined by considering the totality of the circumstances in each case. See *NLRB* v. *L & J Equip. Co.*, 745 F.2d 224, 236-239 (3d Cir. 1984); *NLRB* v. *Advanced Systems, Inc.*, 681 F.2d 570, 575-577 (9th Cir. 1982); *Loose Leaf Hardware, Inc.* v. *NLRB*, 666 F.2d 1036, 1036 (6th Cir. 1981); *Hickory Springs Mfg. Co.* v. *NLRB*, 645 F.2d 506, 510 (5th Cir. 1981); *Scioscia d/b/a Home & Indus. Disposal Serv.*, 266 N.L.R.B. 100, 101 (1983). Among the factors to be considered are the number and severity of any threats, the number of workers threatened, and the degree of circulation and the likelihood of persistence of the threats in the minds of employees. *NLRB* v. *L & J Equip. Co.*, 745 F.2d at 236 n.17. In this case, the Board and the court of appeals found that Bass's isolated statement to one other employee about the possibility of violence if the Company used strikebreakers did not establish a prima facie case of coercion. That fact-bound determination turns on an evaluation of the circumstances of this case and does not warrant further review.[2]

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[2] The Board found that Bass was not an agent of the Union and that, assuming that petitioner's allegations were true, Bass's single, isolated statement did not create a general atmosphere of fear and coercion precluding free choice in the election. The Board accords less weight to election misconduct not attributable to the parties and will set aside an election based on misconduct by a third party only when it engenders a general atmosphere of fear and coercion. *Hamilton Label Serv., Inc.*, 243 N.L.R.B. 598 (1979). That position has been upheld

Petitioner contends (Pet. 9-13) that the court of appeals' decision conflicts with the decisions cited above. That claim lacks merit. In each of those cases there was far more threatening conduct than was involved here. For example, in *L & J Equip. Co.* a company-owned truck used by an employee who was generally considered to hold pro-management views, was destroyed by a fire in his driveway, and the back of the truck was painted with the word "scab." Word of the incident spread quickly to all employees. 745 F.2d at 228. That employee was also told by a pro-unon employee and by an individual who identified himself as a union organizer that he should " 'take care of number one' " and " 'watch' " himself, and that employees who crossed a picket line in the event of a strike might risk personal injury. *Ibid.* Many of the company's employees also heard a rumor that another employee was told that if he crossed the picket line "his legs [would be] broken." *Id.* at 229. Moreover, less than a week before the election, a company-owned barn was totally destroyed by a fire of unknown origin, and the company's employees again quickly learned of the incident. And during that period, one union organizer told several employees (although apparently in a joking fashion) that " 'if it [the election] doesn't go our way, I am going to shoot each one of you guys as you come down off that hill.' " *Ibid.* The court found that whether the incidents in that case had made a fair election impossible must be considered in their totality, and remanded the case to the Board for that determination. *Id.* at 236-239 & n.17.

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by the courts. *May Dept. Stores Corp.* v. *NLRB*, 707 F.2d 430, 432 (9th Cir. 1983); *NLRB* v. *Georgetown Dress Co.*, 537 F.2d 1239, 1242 (4th Cir. 1976); *Boston Insulated Wire & Cable Co.*, 259 N.L.R.B. 1118, 1119 (1982); *Orleans Mfg. Co.*, 120 N.L.R.B. 630, 633 (1958).

Similarly, in *Hickory Springs* there were pervasive threats made or adopted by union officials that violence and "assorted mayhem" would befall employees who crossed the union's picket lines. 645 F.2d at 509-510.[3] The court held that "such pervasive threats of violence as these" required a hearing before the Board. *Id.* at 510. And in *Loose Leaf Hardware* a union representative told an audience of employees that "the Teamsters controls the actions on the picket line, but not off the picket line," and that "people who crossed the picket line had accidents attributed to 'acts of God.' " *Loose Leaf Hardware, Inc.*, 246 N.L.R.B. 350, 350 n.2 (1979).[4] The court of appeals concluded that "[u]pon a consideration of the record as a whole," the Board had erred by denying the company a hearing on its coercion claim. 666 F.2d at 1036. None of these cases involved a single, isolated statement to one employee by a member of the union's in-plant committee.[5]

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[3] Employees were told, inter alia, that anyone who crossed a picket line "should be 'taken out and have the dog – beat out of them' "; that persons found driving a truck during a strike "would find themselves in a gully" (a particular section of the road was also cited); that whatever was necessary "would be done in the event of a strike"; and that "anyone who crossed the line would 'get it.' " 645 F.2d at 509.

[4] Member Penello, dissenting in part, noted that the statement was made "in the context of alleged rumors of such threats circulating throughout the plant" and that "several employees stated that they had heard such threats made by [the union's] representatives." 246 N.L.R.B. at 350.

[5] In *NLRB* v. *Advanced Systems, Inc., supra*, the court did not hold that a threat of future violence directed at strikebreakers would in itself be prima facie grounds for setting aside an election. The court's ruling that the Board had abused its discretion in denying a hearing in that case was based on allegations of threats by a union agent of harassment and physical injury to eligible voters who did not support the union in the election, and evidence of election day vandalism to the property of a defecting union supporter. 681 F.2d at 576.

Petitioner errs in claiming (Pet. 9) that the court below adopted the rule that threats directed at management or strikebreakers can never amount to coercion. Petitioner relies on the court of appeals' statement that Bass's alleged threat was insufficient to establish a prima facie case of coercion, since it was directed at management or at strikebreakers and not at voters in the election. The court of appeals, however, did not rule that such a statement can never be coercive. Its remark must be read in light of the facts of this case, in which, as the court of appeals noted, Pet. App. D4, Bass made the alleged statement only to Burgess and in response to Burgess's hypothetical inquiry as to what would happen if petitioner replaced striking employees. The court of appeals' remark is therefore best understood simply as an explanation that in this case Bass's hypothetical statement did not require an evidentiary hearing because, even if it was made, it would not warrant invalidating the election.[6] Moreover, the Board

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In that context, the court concluded that allegations of repeated, public and unprovoked threats of violence to strike replacements might be relevant in determining whether eligible voters, who were themselves directly threatened if they did not vote for the Union, might "fear[] Union reprisals." 681 F.2d at 577. Contrary to petitioner's claim (Pet. 11), the decision in *Advanced Systems* is not inconsistent with the holding in this case, that an offer to prove a single statement, arguably threatening violence to replacements in a future, theoretical strike, is insufficient without more to establish a prima facie case that coercive conduct prevented a free election.

Petitioner also errs in relying (Pet. 12) on *Scioscia d/b/a Home & Indus. Disposal Serv., supra.* That case also involved threats made within an hour of the election to current employees who might refuse to cooperate with the union in the event of a future strike, and that were "punctuated * * * with historical fact, i.e., an individual who refused to toe the line during the Union's last strike was 'still in the hospital.' " 266 N.L.R.B. at 101-102. See also page 7 note 4, *supra.*

[6] Although union threats to employees concerning what it may do to them at a future time may influence their present behavior, an

has held that threats of violent repercussions if employees oppose the union in the future can constitute objectionable conduct sufficient to set aside an election. *Scioscia d/b/a Home & Indus. Disposal Serv.*, 266 N.L.R.B. at 101.[7] Accordingly, the difference between the decision below and the cases cited above turns on a difference in the facts, not a disagreement on the relevant principles.

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isolated threat made in the presence of one employee, directed to persons who are not employees, in the event of a future strike, may reasonably be viewed as having a lesser impact on the voters in the election. Petitioner's contention (Pet. 17-18) that the court of appeals erred in concluding that Bass's statement was not directed at employees who might later cross a picket line (as opposed to replacements for striking employees) merely takes issue with the court's review of the Board's factual findings, which do not warrant further review by this Court.

[7] In *Scioscia*, the Board adopted the Fifth Circuit's reasoning in *Hickory Springs*, on which petitioner relies, and reversed its previous rule that threats directed to employees by union agents were not grounds for setting aside an election unless the threats related to the outcome of the election. 266 N.L.R.B. at 101.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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